BOARD OF ELECTIONS AND ETHICS
CERTIFICATION OF ANC/SMD VACANCIES

The District of Columbia Board of Elections and Ethics hereby gives notice that there are vacancies in fourteen (14) Advisory Neighborhood Commission offices, certified pursuant to D.C. Official Code §1-309.06(d)(2);2001 Ed.

VACANT: **7D02**

Petition Circulation Period: **Monday, September 8, 2003 thru Monday, September 29, 2003**
Petition Challenge Period: **Thursday, October 2, 2003 thru Wednesday, October 8, 2003**

VACANT: **3D07, 3D08, 3E05**
5C10, 5C11
6B11
8B03, 8C05, 8C06

Petition Circulation Period: **Wednesday, September 10, 2003 thru Tuesday, September 30, 2003**
Petition Challenge Period: **Friday, October 3, 2003 thru Thursday, October 9, 2003**

VACANT: **2A06**
4A05
8E01

Petition Circulation Period: **Monday, September 15, 2003 thru Monday, October 6, 2003**
Petition Challenge Period: **Thursday, October 9, 2003 thru Thursday, October 15, 2003**

VACANT: **7D07**

Petition Circulation Period: **Monday, September 29, 2003 thru Monday, October 20, 2003**
Petition Challenge Period: **Thursday, October 23, 2003 thru Wednesday, October 29, 2003**

Candidates seeking the Office of Advisory Neighborhood Commissioner, or their representatives, may pick up nominating petitions at the following location:

D.C. Board of Elections and Ethics
441 - 4th Street, NW, Room 250N

For more information, the public may call 727-2525.

DISTRICT OF COLUMBIA REGISTER SEP 2 6 2003

District of Columbia
BOARD OF ELECTIONS AND ETHICS

Monthly Report

of

VOTER REGISTRATION STATISTICS

as of

JULY 31, 2003

Covering Citywide Totals by:

WARD, PRECINCT, and PARTY

One Judiciary Square
441 - 4th Street, NW, Suite 250N
Washington, DC 20001
(202) 727-2525
http://www.dcboee.org

D.C. BOARD OF ELECTIONS AND ETHICS

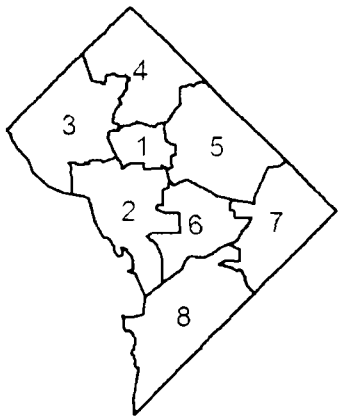
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

CITYWIDE SUMMARY

Party Totals and Percentages by Ward for the period ending July 31, 2003

WARD	DEM	REP	STG	N-P	OTH	TOTALS
1	27,013	2,128	966	6,908	200	37,215
2	22,759	4,868	454	7,591	133	35,805
3	27,760	7,584	378	8,093	74	43,889
4	40,383	2,373	606	6,013	179	49,554
5	38,218	1,648	597	5,267	165	45,895
6	32,334	3,895	587	6,160	153	43,129
7	36,148	1,288	456	4,583	134	42,609
8	28,174	1,226	517	4,078	120	34,115
TOTALS	252,789	25,010	4,561	48,693	1,158	332,211
TOTAL Percentage (by party)	76.1%	7.5%	1.4%	14.6%	0.3%	100.0%

Ward Index



D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 4 For the Period Ending: July 31, 2003

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
45	1,794	74	37	281	12	*2,198*
46	2,459	76	41	368	19	*2,963*
47	2,064	132	38	420	12	*2,666*
48	2,401	134	43	349	15	*2,942*
49	585	30	15	109	2	*741*
51	2,791	592	27	558	6	*3,974*
52	1,080	263	8	208	1	*1,560*
53	965	76	16	188	5	*1,250*
54	1,836	111	41	325	16	*2,329*
55	2,181	79	31	291	10	*2,592*
56	2,665	67	34	399	9	*3,174*
57	2,215	76	31	318	14	*2,654*
58	2,009	47	29	263	8	*2,356*
59	2,337	70	38	304	9	*2,758*
60	1,536	74	33	327	6	*1,976*
61	1,382	55	16	165	3	*1,621*
62	2,923	169	35	303	5	*3,435*
63	2,622	113	56	366	*10*	*3,167*
64	2,136	72	18	224	5	*2,455*
65	2,402	63	19	247	12	*2,743*
TOTALS	*40,383*	*2,373*	*606*	*6,013*	*179*	*49,554*

D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 5 For the Period Ending: July 31, 2003

PRECINCT	*DEM*	*REP*	*STG*	*N-P*	*OTH*	*TOTALS*
19	2,634	130	82	469	*6*	*3,321*
44	2,106	198	38	417	*16*	*2,775*
66	3,977	98	30	372	*16*	*4,493*
67	2,700	103	21	304	*12*	*3,140*
68	1,664	154	31	262	*8*	*2,119*
69	1,995	79	16	192	*9*	*2,291*
70	1,296	60	27	194	*2*	*1,579*
71	2,242	76	34	285	*9*	*2,646*
72	3,129	85	38	421	*11*	*3,684*
73	1,551	69	27	245	*6*	*1,898*
74	2,871	156	42	437	*15*	*3,521*
75	2,191	91	45	357	*13*	*2,697*
76	518	23	11	74	*5*	*631*
77	2,221	85	36	313	*10*	*2,665*
78	1,872	58	33	249	*6*	*2,218*
79	1,523	59	28	214	*5*	*1,829*
135	2,177	99	50	352	*12*	*2,690*
139	1,551	25	8	110	*4*	*1,698*
TOTALS	*38,218*	*1,648*	*597*	*5,267*	*165*	*45,895*

D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 6 *For the Period* Ending: *July 31, 2003*

PRECINCT	*DEM*	*REP*	*STG*	*N-P*	*OTH*	*TOTALS*
1	2,089	120	44	365	*8*	*2,626*
81	3,681	203	57	512	*21*	*4,474*
82	1,981	126	33	330	*8*	*2,478*
83	2,422	146	51	426	*15*	*3,060*
84	1,674	344	30	370	*10*	*2,428*
85	2,010	431	42	474	*8*	*2,965*
86	1,801	185	25	303	*7*	*2,321*
87	2,091	112	44	321	*13*	*2,581*
88	1,698	247	27	319	*4*	*2,295*
89	2,017	589	38	517	*9*	*3,170*
90	1,140	179	16	275	*5*	*1,615*
91	2,815	231	58	552	*17*	*3,673*
127	2,797	247	56	482	*8*	*3,590*
128	1,204	112	26	265	*5*	*1,612*
130	1,055	427	22	296	*4*	*1,804*
131	696	36	11	99	*3*	*845*
142	1,163	160	7	254	*8*	*1,592*
TOTALS	*32,334*	*3,895*	*587*	*6,160*	*153*	*43,129*

D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 7 *For the Period Ending: July 31, 2003*

PRECINCT	*DEM*	*REP*	*STG*	*N-P*	*OTH*	*TOTALS*
80	1,122	40	14	146	*6*	*1,328*
92	1,146	51	19	151	*7*	*1,374*
93	1,099	49	14	142	*4*	*1,308*
94	1,481	64	17	*175*	*5*	*1,742*
95	1,165	20	20	*174*	*2*	*1,381*
96	1,603	64	22	*226*	*3*	*1,918*
97	835	31	16	*117*	*1*	*1,000*
98	1,401	*37*	*15*	*157*	*9*	*1,619*
99	939	*41*	*15*	*142*	*6*	*1,143*
100	1,150	*48*	*23*	*172*	*4*	*1,397*
101	1,371	*33*	*11*	*150*	*8*	*1,573*
102	1,700	*57*	*14*	*187*	*7*	*1,965*
103	2,541	*85*	*32*	*353*	*9*	*3,020*
104	1,804	*62*	*23*	*247*	*7*	*2,143*
105	1,667	*67*	*32*	*195*	*3*	*1,964*
106	2,412	*75*	*32*	*265*	*7*	*2,791*
107	1,061	*45*	*17*	*167*	*2*	*1,292*
108	1,029	*45*	*6*	*86*	*4*	*1,170*
109	943	*40*	*9*	*93*	*1*	*1,086*
110	3,378	106	35	398	*12*	*3,929*
111	1,543	*42*	*25*	*226*	*3*	*1,839*
112	1,606	*48*	*19*	*211*	*11*	*1,895*
113	1,721	*86*	*12*	*227*	*8*	*2,054*
132	1,431	52	*14*	*176*	*5*	*1,678*
TOTALS	*36,148*	*1,288*	*456*	*4,583*	*134*	*42,609*

D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 8

For Period Ending: July 31, 2003

PRECINCT	*DEM*	*REP*	*STG*	*N-P*	*OTH*	*TOTALS*
114	2,077	99	45	296	30	*2,547*
115	1,608	48	34	275	2	*1,967*
116	2,474	99	42	354	11	*2,980*
117	786	32	20	115	1	*954*
118	1,682	82	38	258	3	*2,063*
119	1,995	105	43	273	5	*2,421*
120	*1,484*	68	28	224	7	*1,811*
121	2,448	97	47	340	9	*2,941*
122	1,172	41	19	150	2	*1,384*
123	1,751	172	37	298	4	*2,262*
124	1,818	57	28	239	4	*2,146*
125	2,636	95	48	373	6	*3,158*
126	2,263	78	32	325	11	*2,709*
133	1,105	48	9	135	8	*1,305*
134	1,367	49	20	197	4	*1,637*
140	1,508	56	27	226	13	*1,830*
TOTALS	*28,174*	*1,226*	*517*	*4,078*	*120*	*34,115*

SECRETARY OF THE
DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
OFFICE OF THE SECRETARY
OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

Final Decision

Appeal of: Stephanie J. Gold, Esq.
o/b/o American University

Matter No: 385416

Date: September 12, 2003

Arnold R. Finlayson, Esq., Director, Office of Documents and Administrative Issuances, participated in the preparation of this decision.

INTRODUCTION

The above-captioned matter, commenced pursuant to section 207(a) of the District of Columbia Freedom of Information Act ("D.C.-FOIA"), D.C. Official Code § 2-537(a)(2001), is before the Secretary of the District of Columbia for administrative review and a final decision[1] in connection with Stephanie J. Gold's formal appeal, on behalf of (o/b/o) American University, Washington, D.C.

[1] By Mayor's Order 97-177, dated October 9, 1997, the Secretary of the District of Columbia was delegated the authority vested in the Mayor to render decisions on administrative appeals and petitions for review under the D.C.-FOIA.

to Mayor Anthony A. Williams.[2]

Ms. Gold (hereinafter the "appellant") is appealing the partial denial of her D.C.-FOIA request for certain "property-specific files and records related to administrative appeals of property assessments" maintained in the files of the Office of Tax and Revenue ("OTR"). Appeal letter p. 2.

BACKGROUND

The appellant is an attorney in the Washington, D.C. office of the law firm of Hogan & Hartson, L.L.P. and represents the American University ("AU") in a matter concerning the valuation of Spring Valley and AU real property in the District of Columbia.

By letter dated November 21, 2002, the appellant submitted a D.C.-FOIA request to OTR's FOIA officer wherein she asked for copies of the following:

1. Any and all documents and materials related to the assessment for real property tax purposes of each property on the attached list;[3]

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[2] Pursuant to section 207(a) of the D.C.-FOIA, "[a]ny person denied the right to inspect a public record of a public body *may petition the Mayor* to review the public record to determine whether it may be withheld from public inspection." D.C. Official Code § 2-537(a)(emphasis added).

[3] The "attached list" referenced in paragraphs 1 through 4 of the appellant's D.C.-FOIA request contains the addresses of more than 1100 properties.

2. Any and all documents and materials related to any appeal by the owner(s) of each property on the attached list with respect to that property's assessment for real property tax purposes;

3. Any and all documents and materials related to OTR's, RAPD's, and/or BRPAA's decision to reduce the real property tax assessments of certain properties on the attached list; and

4. Any and all documents and materials related to the characteristics of each property on the attached list.

Letter dated November 21, 2002 from S. Gold to A. Washington.

Subsequently, in a letter dated January 6, 2003, the appellant wrote a letter to OTR's FOIA officer wherein she advised that, based on the information obtained from that office, items 1 and 4 of the November 21, 2002 D.C.-FOIA request were "Closed requests" but that "we have not received a response to items 2 and 3 of the November 21 FOIA request." Letter dated January 6, 2003 from S. Gold to A. Washington.

The January 6 letter further requested "the following related information pertaining to appeals of FY 2003 real property tax assessments for all residential properties in the District of Columbia:

- The total number of FY 2003 residential real property tax assessments that were appealed through the first level appeal process, broken down by neighborhood.

- The total number of FY 2003 residential real property tax assessments that were reduced based on a first level appeal, broken down by neighborhood.

- The total number of FY 2003 residential real property tax assessments that were or have been appealed through the second level appeal process, broken down by neighborhood.

- The total number of FY 2003 residential real property tax assessments that were reduced based on a second level appeal, broken down by neighborhood.

- The total number of FY 2003 residential real property tax assessments that were or have been appealed through the third level appeal process, broken down by neighborhood.

- The total number of FY 2003 residential real property tax assessments that were reduced based on a third level appeal, broken down by neighborhood."

Id. at page 3.

Approximately three months later, the appellant followed-up with another letter to OTR's FOIA officer, dated April 8, 2003, in which she stated that OTR "ha[d] not responded completely to [her] FOIA request." Letter dated April 8, 2003 from S. Gold to A. Washington. According to the aforesaid letter, "OTR maintains property-specific files and records related to first level appeals and that documents and materials in those files and records are responsive to our request." Id. The letter goes on to state "[t]o date, OTR has not permitted us access to those files and records nor has it provided written denial of our request for such access." Id.

In response to the April 8, 2003 letter, OTR's Disclosure Attorney, in a letter dated May 12, 2003,

advised the appellant, in pertinent part, as follows:

> ***The additional documents you are seeking "property-specific files and records related to first level appeals" include information submitted by taxpayers to OTR of a personal nature where "... public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."
>
> For that reason, we are denying your request for release of these documents as being exempt from FOIA disclosure pursuant to D.C. Official Code § 2-534(a)(2).

Letter dated May 13, 2003 from W. Bowie to S. Gold.

Dissatisfied with OTR's partial denial of her D.C.-FOIA request, the appellant filed the instant appeal with Mayor Anthony A. Williams. On appeal, the appellant contends that "OTR has failed to provide an adequate explanation for its partial denial, as required by law, and its reliance on Section 2-534(a)(2) of the D.C. Code ("Exemption 2") is contrary to law." Appeal letter p. 1.

Following a general overview of the legal principles underlying the D.C.-FOIA, this decision provides a discussion on the merits of the subject appeal.

III. DISCUSSION

A. GENERAL OVERVIEW OF THE D.C.-FOIA

The D.C.-FOIA, like the federal FOIA upon which it was modeled, was enacted in 1976 to divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon the

receipt of a request for information. See Subcommittee on Administrative Practice & Procedure of the Senate Committee on Judiciary, 95th Cong., 2d. Sess., *Freedom of Information: A Compilation of State Laws* (Comm.Print 1978); see also Washington Post v. Minority Business Opportunity Commission, 560 A.2d 517, 521 (D.C. 1989). In this regard, the D.C.-FOIA was "designed to promote the disclosure of information, not inhibit it." Id.

The D.C.-FOIA embodies "[t]he public policy of the District of Columbia . . . that all persons are entitled to full and complete disclosure of information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-531; see Donahue v. Thomas, 618 A.2d 601, 602 n.2 (D.C. 1992); Newspapers, Inc. v. Metropolitan Police Department, 546 A.2d 990, 993 (D.C. 1988); Barry v. Washington Post Company, 529 A.2d 319, 321 (D.C. 1987).

In order to accord full force and effect to the spirit and intent of the D.C.-FOIA, officials of District of Columbia public bodies are required to construe its provisions "with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information." D.C. Official Code § 2-531; see Washington Post, 560 A.2d at 521; Newspapers, Inc., 546

A.2d at 993. Thus, the policy underlying the D.C.-FOIA favors the broad disclosure of official records in the possession, custody or control of public bodies of the government of the District of Columbia, unless such records (or portions thereof) fall squarely within the purview of one or more of the nine categories of information which are expressly exempted from the disclosure mandate. See Washington Post, supra; Newspapers, Inc., supra. The nine statutory exemptions enumerated in the D.C.-FOIA, which protect certain types of confidential and/or privileged information from disclosure, "are to be construed narrowly, with ambiguities resolved in favor of disclosure." Washington Post, supra.

B. D.C.-FOIA's BROAD DISCLOSURE MANDATE AND EXEMPTION SCHEME

Section 202(a) of the D.C.-FOIA provides that "[a]ny person has [the] right to inspect, and at his or her discretion, to copy *any public record* of a public body, *except as otherwise expressly provided by* § *2-534.*" D.C. Official Code § 2-532(a)(emphasis added). Section 2-534 of the D.C. Official Code, conspicuously entitled "**Exemptions from disclosure**," in turn, enumerates the nine categories of information which "*may* be exempt from disclosure under the provisions of [the D.C.-FOIA]." D.C. Official Code § 2-

534(a)(1)-(9)(emphasis added).[4]

Taken together, sections 2-532(a) and 2-534 of the D.C. Official Code clearly and explicitly require the mandatory disclosure of all public records in the possession, custody or control of District public bodies, to the extent that such records (or any reasonably segregable portions thereof),[5] do not fall within the ambit of any of the nine statutory exemptions which protect certain categories of public records from disclosure. See Barry v. Washington Post Co., 529 A.2d 319, 321 (D.C. 1987)("The [D.C.-FOIA] provides for full disclosure unless the information requested is exempted under a specific statutory provision").

C. APPLICABILITY OF D.C.-FOIA EXEMPTION 2

In the instant matter, OTR's Disclosure Attorney

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[4] In the legal sense, the "use of the word 'may' in a statute ordinarily denotes discretion." In re Langon, 663 A.2d 1248 (D.C. 1995). Indeed, the federal FOIA has been interpreted by federal courts to permit agencies to make discretionary disclosures of records otherwise exempt under at least four of the exemptions to the federal FOIA. See Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997)("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information").

[5] D.C. Official Code § 2-534(b) provides, in pertinent part, that "[a]ny reasonably segregable portion of a public record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section."

invoked D.C.-FOIA Exemption 2 to deny the appellant's request for a copy of "property-specific files and records related to first level appeals." Letter dated July 12, 2003 from W. Bowie to S. Gold.

D.C.-FOIA Exemption 2 protects from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]" D.C. Official Code § 2-534(a)(2).

The propriety of a public body's decision to withhold personal information from disclosure to a third party pursuant to D.C.-FOIA Exemption 2 was at issue in Hines v. Board of Parole, 567 A.2d 909 (D.C. 1989).

In Hines, the D.C. Court of Appeals affirmed the trial court's grant of summary judgment in favor of the Parole Board which had invoked D.C.-FOIA Exemption 2 to deny an inmate's D.C.-FOIA request for records relating to applications filed by Lorton inmates requesting reduction of their minimum sentences. The appellate court concluded that it "could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of [D.C.-FOIA Exemption 2]" to disclose to the requester "Board records about other Lorton inmates . . . that show why a decision was or was not made by the Board to seek a

reduction in sentence." Id. at 913.

During the course of reaching its decision, the court, citing the U.S. Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), recognized that the determination as to whether personal information contained in public records is protected from disclosure required a balancing of "the privacy interest of those who are the subject of the documents in question or those who may be harmed by their release against the public interest in the release of the documents." Id. at 912.

In Reporters Committee, the U.S. Supreme Court reaffirmed several relevant principles enunciated in its earlier decisions interpreting the extent to which the public interest in certain information warrants an invasion of the personal privacy interests of an individual. First, the court stated that it "must balance the public interest in disclosure against the interest Congress intended the exemption to protect." Id. at 776. Second, the Court intimated that "whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information was made." Id. at 771. In this regard, the court remarked that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to

disclosure as one with a special interest [in a particular document.]'" Id. (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)). Finally, the court stated that disclosure is in the public interest when it achieves "the core purposes of the FOIA [which is] to contribut[e] significantly to public understanding of the operations or activities of the government." Id. at 775. In elaborating upon this final principle, the court found its decision in Department of Air Force v. Rose, 425 U.S. 3352 (1965) to be illustrative.

In Rose, at issue was whether the U.S. Air Force properly redacted the names of cadets from disciplinary hearing summaries disclosed pursuant to a federal FOIA request. Commenting on its decision in Rose, the U.S. Supreme Court in Reporters Committee remarked that "[t]he summaries obviously contained information that would explain how the disciplinary procedures actually functioned and therefore were the appropriate subject of a FOIA request." Id. at 773. Regarding the redaction of the "information that would identify the particular cadets to whom the summaries related," the court opined:

> The deletions were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a

"clearly unwarranted" invasion of privacy. Id. at 773-74.

Although Reporters Committee specifically dealt with the privacy rights implicated in the disclosure of law enforcement records under federal FOIA Exemption 7(C) and not with the privacy interests triggered under federal FOIA Exemption 6, the federal counterpart to D.C.-FOIA Exemption 2, the principles enunciated in that case apply to both circumstances. See United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994); Rose, supra, at 372 ("Congress sought to construct [federal FOIA Exemption 6]" to "require a balancing of the individual's right of privacy against the preservation of the basic purpose of the [FOIA] 'to open agency action to the light of public scrutiny.'").

In her appeal letter, the appellant raises three contentions: First, the appellant contends that OTR failed to establish that it is entitled to withhold the requested records pursuant to D.C.-FOIA Exemption 2. Second, the appellant asserts that OTR's reliance on D.C.-FOIA Exemption 2 is contrary to applicable law. Finally, the appellant suggests that if she executes a confidentiality agreement, disclosure of the requested information to her pursuant to her D.C.-FOIA request would not implicate any

privacy concerns.

With respect to the appellant's first contention, (i.e., that OTR failed to establish that it was entitled to withhold the requested records pursuant to D.C.-FOIA Exemption 2), this office agrees that OTR, in its letter denying the documents at issue, "does not explain how Exemption 2 applies to the requested documents and materials, nor does it demonstrate that public interest considerations necessitate withholding the documents and materials." Appeal letter p. 2. As the appellant correctly points out, the regulations which implement the D.C.-FOIA require public bodies which deny a D.C.-FOIA request, in whole or in part, to provide an "explanation of how each exemption applies to the record withheld and a statement of the public interest consideration which establish the need for withholding the record." 1 DCMR § 407.2(b) (June 2001). Therefore, unless the appellant is correct with respect to either her second or third contentions, it is necessary to remand this matter to OTR for additional information to supplement the record so that this office can make a reasoned determination on the appropriateness of its decision to withhold the requested documents from disclosure to the appellant.

Turning next to the second contention on appeal (i.e., OTR's reliance on D.C.-FOIA Exemption 2 is contrary to applicable law), the appellant, in addressing the public interest side of the D.C.-FOIA Exemption 2 balancing test discussed in detail above, asserts that the "the disclosure of the requested property-specific files and records would contribute significantly to understanding OTR's operations and activities, in particular with respect to its fiscal year 2003 real property assessment decisions based on administrative appeals." Appeal letter p.3.

As to the personal privacy interests implicated in the disclosure of the requested records, the appellant posits that the "privacy interest involved is relatively weak. The requested property-specific files and records in no way relate to personal characteristics of property owners but rather relate solely to non-personal property characteristics." Id.

In its denial letter, OTR did not elaborate upon the D.C.-FOIA Exemption 2 balancing test enunciated by the D.C. Court of Appeals in Hines.

Based on the record evidence before the Secretary of the District of Columbia, there is insufficient information for this office to weigh the public interest versus personal privacy considerations to render an informed

decision on the merits of the instant appeal. Therefore, unless the appellant prevails on contention three of its appeal, it is necessary to remand this matter to OTR for an appropriate legal analysis which, as discussed above, requires "a balancing of 'the privacy interest of those who are the subject of the documents in question or those who may be harmed by their release against the public interest in the release of the documents.'" Hines, supra, 567 A.2d at 912.

As a third and final contention advanced on appeal in favor of disclosure of the requested information, the appellant offers to enter into a confidentiality agreement which, she asserts, "conclusively eliminates any possible concern about an unwarranted invasion of privacy." Appeal letter p. 4. Appellant's third contention, however, fails to take into account that once records are disclosed to a person pursuant to a FOIA request, it becomes public information and any member of the public, upon request therefor, is required to be given access to such information. See Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1082, (9th Cir. 1997)(9th Circuit agreed with the government's argument, and trial court's ruling, that "FOIA does not permit selective disclosure of information only to certain parties, and that once the

information is disclosed to [a requester], it must also be made available to all members of the public who request it."); see Reporters Committee, supra, at 771 ("Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document.]'"); see also Swan v. Securities and Exchange Commission, 96 F.3d 498, 500 (D.C. Cir. 1996).

Accordingly, the Secretary of the District of Columbia rejects the appellant's contention that, upon execution of a confidentiality agreement, the disclosure of the requested documents would not implicate important personal privacy concerns.

IV. CONCLUSION

Based on all the foregoing, it is the final decision of the Secretary of the District of Columbia that the instant appeal is sustained, in part, and remanded to OTR with instructions to provide, within seven (7) working days, a written response to this office, with a courtesy copy to the appellant, which addresses the following:

1. A brief explanation as to how D.C.-FOIA Exemption 2 applies to the records withheld **and** the public interest considerations which establish the need for withholding the records, as required by 1 DCMR § 407.2(b)(June 2001);

2. An analysis which provides a balancing of the affected property owners' right of privacy in the property-specific files and records related to first level appeals against the public interest in disclosure; and

3. Whether any reasonably segregable portion of any documents withheld may be released and a written justification which explains fully the reason for any deletions, the extent of which shall be indicated on the released record, if possible.

OTR is further directed to provide a written certification to the Mayor via the General Counsel to the Mayor, with a copy to the Office of the Secretary, within ten (10) working days indicating its compliance with this decision or the reasons for noncompliance with any of the directives herein.

This constitutes the final decision of the Secretary of the District of Columbia in this matter.

SHERRYL HOBBS NEWMAN
SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16935 of Southeast Citizens for Smart Development, pursuant to 11 DCMR §§ 3100 and 3101, from administrative decisions of the Zoning Administrator, allowing the construction of four single family dwellings allegedly in violation of the side yard requirements, the location parking space requirements, and the parking space accessibility requirements of the Zoning Regulations (§§ 405.9, 775.2, 2116.1 and 2117.4) in the C-2-B zone at premises 1308, 1310, 1312 and 1314 Potomac Avenue, S.E.

HEARING DATES: **January 21, 2003, April 1, 2003, and April 15, 2003**

DECISION DATE: **January 28, 2003 and May 6, 2003**

DECISION AND ORDER

Southeast Citizens for Smart Development (SCSD) filed an appeal with the Board of Zoning Adjustment (BZA) on August 1, 2002 alleging that the Zoning Administrator erred in approving the issuance of building permits on July 8, 2002 to Father Flanagan's Boys Home (the property owner or the owner) for 4 single family dwellings at 1308, 1310, 1312, and 1314 Potomac Avenue, S.E.

Advisory Neighborhood Commission (ANC) 6B joined the SCSD in its appeal following a duly noticed meeting held on September 12, 2002.

The appellant was represented initially by Andrea Ferster, Esq., then by Mary Withum, Esq., and was supported by ANC Executive Director Candace Avery. The property owner was represented by Phil Feola, Esq. and Martin Sullivan, Esq. of Shaw Pittman, LLP, and the Department of Consumer and Regulatory Affairs (DCRA) of the District of Columbia was represented by Arthur Parker, Esq., Office of the Corporation Counsel.

Preliminary and Procedural Matters

The Office of Zoning scheduled a hearing on the appeal for January 21, 2003. Pursuant to 11 DCMR § 3113.4, the Office of Zoning mailed notice of hearing to the appellant, the ANC, the property owner and DCRA.

On or about January 15, 2003, the owner's counsel filed a motion to dismiss the appeal on the ground that challenges to the parking and setback requirements were untimely filed. SCSD opposed the motion and the BZA heard argument from the parties at the

hearing on January 21, 2003.[1] At a special public meeting on January 28, 2003, the BZA voted to grant the motion to dismiss with respect to the alleged parking requirements violation. However, the BZA denied the motion to dismiss with respect to the alleged setback requirements violation and continued the case to April 1, 2003 for a hearing on the alleged setback violation. The owner renewed his full motion to dismiss at the April 1 hearing, but the BZA reaffirmed its prior ruling and held the scheduled hearing on the setback issue.

The Positions of the Parties

SCSD maintains that the 3 buildings at lots 134, 135 and 136 require two side yards under
§ 405.3 of the Zoning Regulations and under BZA Case #16811, *Appeal of David and Janet Pritchard* (the *Pritchard* case). Their expert witness, Lyle Schauer [2], proffered that these 3 buildings did not meet the side yard requirements for semi-detached buildings in a commercial zone because they have only one side yard instead of two. Mr. Schauer reasoned that side yards were required on the west side of the buildings where there are lot line walls, but no common division walls. He interprets the *Pritchard* case to require side yards where there are "free-standing" walls such as the lot line walls here. The ANC concurred with SCSD's position.

DCRA and the owner maintain that the 3 semi-detached buildings on lots 134, 135 and 136 do not require side yards to the west of the buildings where there are lot line walls, that each building requires only one 8 feet side yard to the east.

The BZA Decision

At the conclusion of the public hearing, the BZA voted to deny the appeal with respect to lots 134 and 135 and to grant the appeal with respect to lot 136.

FINDINGS OF FACT

1. The subject properties are located in the C-2-B zone at 1308, 1310, 1312 and 1314 Potomac Avenue, SE, in Ward 6 of the District of Columbia. The four structures at issue sit on four separate lots of record: lots 134, 135, 136 and 137 within Square 1045.

[1] Initially, DCRA took no position on the motion to dismiss. But ultimately DCRA supported the owner's position, arguing that both the side yard setbacks and the parking requirements were determined before the first appeal, resulting in an untimely challenge during the second appeal.

[2] The BZA concluded that Mr. Schauer was an expert witness in zoning regulations of the District of Columbia, based in part on his 8 years of experience as chair for the zoning committee of the Capitol Hill Restoration Society. His professional resume is part of the administrative record in this case.

2. Appellant SCSD is a non-profit corporation organized to facilitate community involvement and education in planning neighborhood development in Ward 6. Its membership includes persons who reside and/or own property within 200 feet of the subject properties.

3. On September 6, 2001, DCRA issued building permits to the owner to construct 4 two-story residences to be used as a community based residential facility. (CBRF).

4. On September 12, 2001, SCSD appealed the issuance of the permits to the BZA challenging the proposed CBRF use of the properties. SCSD did not challenge the issuance of the permits based upon non-compliance with the parking and setback requirements applicable to a CBRF use.

5. On June 21, 2002, the BZA issued an order and decision finding that DCRA erred in issuing the permits to operate as a CBRF as a matter of right. The BZA found that since the 4 properties were to be used as a single CBRF, the number of residents in the combined facility exceeded the number permitted in a CBRF as of right and resulted in a use that required special exception review. The BZA made no findings of fact or conclusions of law as to whether the proposed facility met applicable parking or setback requirements.

6. In early July 2002, the owner applied again for building permits for the proposed project, this time seeking approval of the 4 structures as 4 single-family dwellings. While the proposed CBRF use had changed to a single family dwelling use, the proposed parking configuration and side yard setbacks were no different than those proposed in the original application. The proposed parking and setbacks were also based upon the same plans and drawings submitted with the original application.

7. On July 8, 2002, DCRA issued new permits for 4 single family dwellings at 1308, 1310, 1312, and 314 Potomac Avenue. The permits were identified with new permit numbers, but each new permit was described as a "revision" to one of the 4 initial permits.

8. On August 1, 2002, SCSD appealed the issuance of the 4 revised permits, alleging that the revised permits violated both the parking requirements and the side yard setback requirements in the Zoning Regulations.

9. The 3 buildings on lots 134, 135 and 136 each have west side walls sitting directly on the lot lines; therefore, they have no side yards to the west.

10. None of the 3 buildings share a common division wall with an adjacent structure.

11. Each of the 3 buildings have side yards to the east.

12. The east side yards for lots 135 and 136 are both 8 feet wide.

13. The east side yard for lot 137 is only 2 feet in width, due to a 6 feet wide mudroom, which encroaches into the side yard.

14. The building at lot 137 has 8 feet side yards on both the east and west.[3]

CONCLUSIONS OF LAW

The Motion to Dismiss

If the BZA determines this appeal is untimely, it must be dismissed as a matter of law. The timely filing of an appeal to the BZA is mandatory and jurisdictional *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090 (D.C. 1994). If an appeal is not timely filed, the BZA is without power to consider it. *Sisson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 964 (D.C. 2002); *Woodley Park Comty. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985). "Because the rules of the BZA [as of the date of the filing of this appeal] adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely." *Waste Management of Maryland v. District of Columbia Bd. of Zoning Adjustment*, 775 A. 2d 1117 (D.C. 2001). The District of Columbia Court of Appeals has held that two months between notice of a decision and an appeal therefrom is the limit of timeliness. *Id.*

The gravamen of the owner's argument is that SCSD could have challenged the parking and side yard requirements during its first appeal in September 2001. Instead, it waited nearly 11 months to challenge these requirements during its second appeal in July 2002. The owner relies in particular on the *Woodley Park* case for the proposition that a revised building permit is only appealable as to those aspects of the permit that were revised. Since the owner maintains that only the "use" was revised during the revised permit application process, only the "use" allowed by the revised permit may be appealed from, not the parking requirements and not the side yard requirements. For reasons explained below, the BZA agrees that the appeal of the parking requirements is untimely under the *Woodley Park* doctrine; however, it disagrees that the appeal of the side yard requirements is untimely.

That portion of the appeal challenging the parking requirements must be dismissed as untimely. The proposed parking under both the initial permits and the revised permits was identical and could have been challenged by SCSD at the time of its first appeal.

[3] The parties do not dispute that the construction conformed to the plans submitted with the permit applications.

The owner was required to provide 1 space for each building whether it was used as a single family dwelling or a CBRF. See "Residential Uses" section under 11 DCMR § 2101.1. Thus, whether the subject properties were used as 4 single-family dwellings or 4 CBRFs, the parking requirements were the same and the SCSD was on notice as to the parking approval when the first permit was issued in September, 2001.

The request to dismiss that portion of the appeal challenging the side yard requirements is denied. Unlike the parking requirement, the change in use from CBRFs to single-family dwellings did trigger different legal requirements with respect to the side yard requirements. As a proposed single family semi-detached dwelling in a commercial district, the setbacks were evaluated under §775.3 of the Zoning Regulations, which references requirements of the R-2 District. As a proposed CBRF, however, the building setbacks were first evaluated under §775.5, which contains a different standard for side yards.[4] Thus, while the proposed side yard characteristics may not have changed as a result of the revised permits, the legal criteria under which they were reviewed did change.

SCSD could not possibly have known that the buildings would later be subject to differing side yard requirements when, in September, 2001, the initial permits were issued. It can only reasonably be charged with notice of DCRA's determination on July 8, 2002 when the owner obtained the revised permits as single family semi-detached buildings subject to the more stringent side yard requirements. Accordingly, SCSD's appeal of the revised permits-- filed on August 1, 2002—was filed less than 30 days from the decision appealed from and was timely filed under the decisional law of the District of Columbia.

Appeal of the Side Yard Requirements

Under the Zoning Regulations, the buildings at lots 134, 135 and 136 are each a "one-family semi-detached dwelling" with one lot line wall. The Zoning Regulations defines the terms "one family dwelling" and "one family semi-detached dwelling". A one-family dwelling is "a dwelling used exclusively as a residence for one (1) family" 11 DCMR§ 199.1. A "one family semi-detached dwelling is "a one-family dwelling, the wall on one (1) side of which is either a party wall, or lot line wall, having one (1) side yard" 11 DCMR §199.1. A "lot line wall" is defined as "an enclosing wall constructed immediately adjacent to a side lot line, but not a party wall. 11 DCMR § 199.1. As stated in the Findings of Fact, and as acknowledged by the parties, the 3 buildings have lot line walls on the west side of each building and side yards to the east. Therefore, by definition the 3 buildings are one family semi-detached dwellings.

[4] Section 775.3 states: "A one-family semi-detached dwelling shall be subject to the side yard requirements of an R-2 District". Section 775.3 states: "No sideyard shall be required for any other [other than one-family detached and semi-detached dwellings, and hotels] building or structure; but if a side yard is provided, it shall be at least two inches (2 in.) wide for each foot of height of building, but not less than six feet (6 ft.).

Under the Zoning Regulations, a one family semi-detached dwelling is explicitly permitted as a matter of right beginning in the R-2 District, continuing through and including the C-2-B District where the subject dwellings are located. 11 DCMR § 300.3(c).

Under the Zoning Regulations, a one family semi-detached dwelling must have one side yard, with a minimum required width of 8 feet. As previously discussed in paragraph , §775.3 of the Regulations provides that a one family semi-detached dwelling is subject to the side yard requirements of an R-2 District. Turning to §405.3 of the Regulations, a one family dwelling in the R-2 District that does not share a common division wall with another building must have a side yard on "each resulting free-standing side". Under § 405.9 of the Regulations the minimum width of the side yard must be 8 feet.

SCSD claims that under the *Pritchard* case, a lot line wall is a freestanding wall; thus, a side yard is required under § 405.3 above at the lot line (west) side of the buildings and at the east side of the buildings. The BZA disagrees. Neither *Pritchard* nor § 405 can be interpreted in the manner suggested by SCSD and the ANC. As will be explained below, following SCSD's interpretation of § 405 would lead to an absurd result in that it would render meaningless those provisions of the Regulations which permit semi-detached dwellings as a matter of right use. By definition, a semi-detached dwelling is required to have only one side yard, not two. SCSD's interpretation of § 405 would, in effect, require two side yards instead of one whenever a semi-detached dwelling has a lot line wall instead of a common division wall. As pointed out by DCRA, this interpretation would also foster the development of row dwellings-- which have no side yards-- instead of semi-detached dwellings. This outcome is not logical if the underlying policy favoring side yards is to assure light, access, air and safety. In sum, §405.3 of the Zoning Regulations must not be interpreted in a vacuum. Rather, it must be interpreted in harmony with other sections of the Regulations. See, for instance, *The Matter of T.L.J.*, 413 A.2d 154 (D.C. 1980). As such, the BZA reads §405.3 of the Zoning Regulations to require only one side yard for one family semi-detached dwellings. To the extent *Pritchard* suggests otherwise, it is overruled.

The Board concludes that the 3 semi-detached dwellings require one side yard of a minimum width of 8 feet. Therefore, the buildings at lots 135 and 136 comply with the side yard requirements. But the building at lot 134 has only a 2 foot side yard (Findings of Fact No. 9). Therefore, it does not comply with the side yard requirements.

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. To give great weight, the BZA must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive

advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. In this appeal, the ANC concurred with the views advanced by the appellant, SCDC. For the reasons stated above, the BZA finds this advice unpersuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that:

a. the motion to dismiss the appeal as untimely is **GRANTED** as to the parking requirements and **DENIED** as to the side yard requirements.

Vote taken on January 28, 2003

VOTE; 3-1-1 (Anne M. Renshaw, David A. Zaidain, and Peter G. May in favor of the motion; Geoffrey H. Griffis, opposed, and Curtis L. Etherly, Jr., being necessarily absent)

b. the appeal is **DENIED** with respect to lots 135 and 136

Vote taken on May 6, 2003

VOTE; 3-1-1 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., and David A. Zaidain in favor of denying the appeal as to lots 135 and 136; Peter G. May opposed to denying the appeal and Anne M. Renshaw being necessarily absent.

c. The appeal is **GRANTED** with respect to lot 134.

VOTE; 4-0-1 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Peter G. May, and David A. Zaidain in favor of granting the appeal and Anne M. Renshaw being necessarily absent.

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

FINAL DATE OF ORDER: SEP - 8 2003

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16947 of Kuri Brothers, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of J. Gregory Love, Administrator, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs, of the revocation of a certificate of occupancy (#B00181657) for occupancy that does not conform to the use permitted, "automobile service center", in a C-3-A District at premises 4221 Connecticut Avenue, N.W. (Square 2051, Lot 5).

Hearing Dates: April 8, and May 13, 2003

Decision Date: July 1, 2003

ORDER

Appellant, Kuri Brothers, Inc. ("Kuri Brothers" or "Appellant"), filed this appeal, accompanied by a "Petition for Appeal", on September 11, 2002, with the D.C. Board of Zoning Adjustment ("Board"). Appellant contests the revocation of its Certificate of Occupancy ("C of O") for premises located at 4221 Connecticut Avenue, N.W., Washington, D.C. 20008, in Square 2051, Lot 5, in the C-3-A Zoning District [Exhibit 1]. For the reasons stated below, the appeal is denied.

PRELIMINARY AND PROCEDURAL MATTERS:

By letter dated June 27, 2002 and personally served, the Department of Consumer and Regulatory Affairs ("DCRA") provided Appellant with a Notice of Intent to Revoke Certificate of Occupancy # B00181657 ("Notice to Revoke"). Appellant did not respond to the Notice to Revoke within the fifteen days DCRA indicated in the notice. DCRA then notified Appellant's counsel that Appellant was "deemed to have admitted the validity of the charges" set forth in the Notice to Revoke and revoked the C of O on August 19, 2002.

Appellant's premises are located within the boundaries of Advisory Neighborhood Commission ("ANC") 3F, in Single-Member District 3F02 represented by Commissioner Karen L. Perry. ANC 3F is automatically a party to this proceeding pursuant to 11 DCMR § 3106.2.

By letter dated November 12, 2002, Charles E. Smith Residential filed a request to intervene as a party in opposition to this Appeal. Charles E. Smith Residential owns the Van Ness South apartment building at 3003 Van Ness Street, N.W., immediately across a 16-foot public alley from Appellant's premises, and the Consulate Apartment building at 2950 Van Ness Street, N.W., located within 200 feet of the Appellant's premises. At the

April 18, 2003 hearing, the Board granted Charles E. Smith Residential's request to intervene as a party in opposition.

The Board scheduled a public hearing for September 20, 2002 and November 12, 2002, and so notified Appellant [Exhibit 12], DCRA [Exhibit 13], and ANC 3F [Exhibit 14].

ANC 3F submitted a Resolution, approved at a duly-noticed meeting, and with a quorum present, opposing the Appeal [Exhibit 18]. Charles E. Smith Residential also submitted a letter in opposition to the appeal [Exhibit 22].

Appellant filed a request for postponement and rescheduling of the public hearing [Exhibits 15, 16, 17]. Over ANC 3F's opposition [Exhibit 21], the BZA rescheduled the public hearing, finding that the reasons for the rescheduling of the hearing were persuasive.

DCRA and Charles E. Smith Residential made oral motions to dismiss or to affirm on the record on two occasions, April 8, 2003 and May 13, 2003. ANC 3F presented a written motion to affirm and order Appellant to cease and desist, supported by a Memorandum of Law [Exhibit 41]. The Board took these motions under advisement, pending filing of proposed findings of fact and conclusions of law and the rendering of its final decision.

Appellant submitted Appellant's Responses to Exhibits, which listed objections to exhibits being submitted by ANC 3F. To the extent that this submission was intended as a motion to the Board to strike such exhibits from the record it was denied.

On January 28, 2003, the day of the scheduled hearing for this case, only preliminary issues were addressed. The hearings for this case took place on April 8, and May 13, 2003.

Appellant chose to present no formal argument prior to or during the hearings for this case, even after asking that the initial hearing date be postponed. Instead, Appellant asked to be allowed to submit his argument in the context of proposed findings of fact and conclusions of law. Although the Board is not required under its regulations to accept such a submission, the Board chose to allow Appellant an opportunity to spell out any legal arguments he might have, based on the evidence submitted, and thereby present an argument in this case. Many of the arguments listed in Appellant's Petition for Appeal were never presented by Appellant and therefore were not adequately substantiated and thus were not considered. Those that were presented by the Appellant and considered by the Board are addressed below.

At the conclusion of the May 13, 2003, hearing, the record was closed, except the Board set June 24, 2003, as the deadline for submission of proposed Findings of Fact and Conclusions of Law by the parties. While the Appellant's submission more closely resembled a legal brief, it was accepted into the record and considered by the Board in reaching this decision

At its regularly-scheduled meeting on July 1, 2003, the Board denied the Appeal.

FINDINGS OF FACT:

1. Appellant was issued a certificate of occupancy for an "automobile service center" on August 12, 1998 at 4221 Connecticut Avenue, N.W. ("subject property").

2. Automobile service center is not a defined term in the Zoning Regulations.

3. Appellee, DCRA, issued a notice of intent to revoke Appellant's certificate of occupancy for the subject property on June 27, 2002.

4. Appellee issued a final notice of revocation of the certificate of occupancy for the subject property on August 19, 2002.

5. Appellant appealed the DCRA Director's decision to revoke his certificate of occupancy on September 11, 2002.

6. Appellant was advised during the Board's preliminary discussions regarding this case that DCRA's decision to revoke the Appellant's certificate of occupancy was taken pursuant to 12A DCMR § 118.4.

7. Pursuant to 12A DCMR § 118.4.1, a certificate of occupancy may be revoked, "after notice, if the actual occupancy does not conform with that permitted".

8. The subject property is zoned C-3-A.

9. In the C-3-A zone, a repair garage is only permitted by special exception pursuant to 11 DCMR § 743.1.

10. "Automobile accessories sales, including installations" is a permitted use in a C-3-A district.

11. In 11 DCMR § 199.1, a "garage, repair" is defined as: "a building or other structure, or part of a building or structure, with facilities for the repair of motor

vehicles, including body and fender repair, painting, rebuilding, reconditioning, upholstering, equipping, or other motor vehicle maintenance or repair."

12. DCRA and ANC 3F submitted photographs of Appellant's underground space. Those photographs showed automobiles, lifts, other equipment, automotive parts, and vehicles [Exhibits 21 and 35].

13. DCRA and ANC 3F summarized and submitted copies of Appellant's own advertising of services offered at "Van Ness Auto Care", which offered the following: 21 service bays, foreign & domestic car specialist, and diagnostic, tune-up, brake, exhaust, alignment, transmission, and electrical services.

14. ANC 3F also submitted photographs of Appellant's latest advertising sign (taken May 8, 2003) reading: "WE SERVICE & REPAIR ALL CARS DOMESTIC & FOREIGN."

15. DCRA Inspector Anthony Hooks, who testified at the hearing, has the following responsibilities at DCRA: inspection of auto repair garages and monitoring of required licensing for repair garage operations.

16. In the months preceding the date the Notice to Revoke was issued, Inspector Hooks witnessed several vehicles being repaired and saw cars hoisted up on lifts and employees engaged in automobile engine repairs. The Board found Inspector Hooks' testimony with respect to these activities to be credible.

17. Inspector Hooks' photographs taken during his inspection also show that automobile repair activities are taking place on Appellant's property [Exhibit 25].

18. Inspector Hooks submitted into the record Repair Work Orders supplied to him by Chris Kuri, one of Appellant's principals, for repair work ordered by customers during one of days that Inspector Hooks visited the subject property [Exhibit 37].

19. DCRA Inspector Vacylla Williams testified to inspecting the subject property on June 5, 2002 with Inspector Hooks and to witnessing automotive repairs being conducted. The Board found Ms. Williams' testimony to be credible.

20. The notice of intent to revoke the Appellant's C of O details automobile repair and maintenance activities, as witnessed by three different inspectors on four different occasions.

21. Appellant submitted documents [Exhibit 40] that contained the following relevant information:

May 4, 1983 C of O and Application for 4221 Connecticut Avenue, N.W.
Owner: Connecticut Avenue Datsun, Inc.
USE: Automobile Sales and Service
Prior use indicated on application: Automobile Sales and Service
Purpose of application: Ownership Change

October 10, 1986 Application for 4221 Connecticut Avenue, N.W.
Owner: Connecticut Avenue Nissan, Inc.
USE: Motor Vehicle Dealer
Prior use indicated: Motor Vehicle Dealer
Purpose of application: Ownership Change

April 24, 1998 C of O and Application for 4221 Connecticut Avenue, N.W.
Owner: Koo L. Yuen
USE: Automobile Service Center
Use applied for, as stated on application: (Automobile Service Center) Automobile Sales, Automobile Accessory Sales Including Installation
Prior use indicated: Automobile Service Center
Purpose of application: Partial Occupancy - Basement

August 12, 1998 C of O and Application for 4221 Connecticut Avenue N.W., Basement
Owner: Kuri Brothers, Inc.
USE: Automobile Service Center
Use applied for, as stated on application: (Auto Repair)/Office Automobile Service Center
Prior use indicated: Auto Repair
Purpose of application: Ownership Change

22. Appellant also presented C of Os and applications for C of Os for locations other than the subject property. Appellant made no showing that these documents are material to this case. The Board therefore finds these documents irrelevant to this Appeal.

23. As demonstrated by ANC 3F Commissioner Karen Perry in her submission and accompanying documentation [Exhibit 34], DCRA has taken enforcement action

against owners of the subject property due to its use as a repair garage as early as 1989, and continuing thereafter.

24. A May 20, 1992 decision by DCRA Administrative Law Judge Rohulahim Quander found that a repair garage was being operated at the subject property.

25. In 1940, the Board granted a variance to Flood Motor Company to expand its existing repair garage. The approval was "subject to the condition that all repairing shall be incidental to the sale of new cars only" (Exhibit 34, Transcript of October 9, 1940, hearing at page 30).

CONCLUSIONS OF LAW:

Pursuant to D.C. Official Code § 6-641.07 (Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799) (2001 Ed.)), the Board is authorized to hear appeals from any person aggrieved by any "decision based in whole or in part upon any zoning regulation". The decision complained of in this case is the June 27, 2002 decision to revoke the Appellant's certificate of occupancy, pursuant to 12A DCMR § 118.4, which was followed by a final notice of revocation on August 19, 2002. A certificate of occupancy may be revoked, "after notice, if the actual occupancy does not conform with that permitted". 12A DCMR § 118.4.1. Appellant's use of the subject property as a repair garage does not conform to its certificate of occupancy for an "Automobile Service Center". Therefore, the Board finds DCRA's decision to revoke Appellant's certificate of occupancy pursuant to 12A DCMR § 118.4.1 to be proper and denies this appeal. A discussion of these conclusions follows.

1. The scope of review

Appellant has contended throughout the proceeding that the Board is precluded from holding an evidentiary hearing because DCRA has procedures providing for such a hearing when a revocation of a C of O is proposed and that this appeal is governed by the Civil Infractions Act, which limits the Board's scope of review to the record below.

As to the first contention, certainly, if a DCRA revocation hearing had occurred, the Board, as it has done before, could have limited its review to that record. *See Perkins v. District of Columbia Board of Zoning Adjustment,* 813 A.2d 206, 209 (D.C. 2002). Since no hearing was held because the Appellant failed to timely request one, the Board can develop its own record to aid decision making.

The Board's authority to hear appeals from administrative decisions is not limited by the existence of post-decision hearing procedures developed within DCRA. The District of Columbia Court of Appeals has recognized the Board's review authority in similar appeals of DCRA decisions and has further noted that it is the final responsibility of the Board, and not DCRA, to interpret the Zoning Regulations. *See Keefe Co. v. District of Columbia Board of Zoning Adjustment*, 409 A.2d 624 (D.C. 1979); *Association for the Preservation of 1700 Block of N Street, N.W. and Vicinity, et al v. District of Columbia Board of Zoning Adjustment*, 384 A.2d 668 (D.C. 1978).

In Appellant's second contention, Appellant asserts that the Board must confine itself to DCRA's record because DCRA is relying upon a section of the Zoning Act that references the Civil Infractions Act (D.C. Law 6-42; D.C. Official Code § 2-1801 *et seq.*). It is reasoned that since appeals of civil infractions are limited to the record below, this proceeding must be limited accordingly. It is true that DCRA cites D.C. Official Code 6-641.09 (§ 10 of the Zoning Act) as a basis for its action and that the section indicates that violations of the Zoning Act and its regulations may be enforced and adjudicated through the Civil Infractions Act. The problem for the Appellant (and the Board) is that DCRA cites the wrong provision.

DCRA stated in its Notice of Intent to Revoke that "[b]y making major repairs and doing engine work you have operated outside the scope of this Certificate of Occupancy". D.C. Official Code 6-641.09 does not make it unlawful to operate outside the scope of a certificate of occupancy. Rather, that section prohibits undertaking a use without one. The Zoning Regulations do the same. 11 DCMR § 3203.

Thus, since no law or regulation makes it a violation to operate outside the scope of a C of O, as opposed to engaging in a use without one, there can be no civil infraction proceeding brought for doing so. Only the BOCA Supplement specifically refers to the act of operating outside the scope of a C of O, and does so only as a ground for revocation. 12A DCMR § 118. Thus, by asserting that the appellant was operating outside of the scope of its C of O, DCRA limited its enforcement action to revocation under the BOCA Supplement. The Civil Infractions Act is not implicated here because no violation of the Zoning Act or Regulations is directly asserted.

2. Significance of DCRA's erroneous citations.

Appellant was not materially affected by the inaccurate citations. DCRA's inaccurate citations did not have any direct bearing on its course of action in revoking the Certificate of Occupancy. The notice of proposed revocation states the grounds for the action: that the repair garage use being operated at the subject property is not permitted under the existing certificate of

occupancy, as determined by the Zoning Regulations. This complies with the notice requirement of 12A DCMR § 118.4.6, which states that the "Notice of proposed revocation of the Certificate of Occupancy shall be given in writing, setting forth specifically the *grounds* for the action." (emphasis added). Also, DCRA correctly cited to the provision of the Zoning Regulations that requires that a repair garage obtain a special exception in a C-3-A district in order to obtain a C of O for that use. Moreover, Appellant's counsel was ultimately provided with the citation to the authority for DCRA's action, 12A DCMR § 118.4, prior to the hearings for this case, and claimed to have been aware of that subsection prior to the hearing. Lastly, while DCRA's errors might have initially led the Appellant to believe that this should have been treated as a Civil Infractions Act case, Appellant did treat the appeal otherwise, after stating: "[a]ssuming *arguendo* that this Board had the authority to adjudicate this appeal *de novo*. . ." [Exhibit 44 at 16].

3. The Burden of Proof

Appellant has asserted that the Board erroneously applied the burden of proof in this case. The Board, however, finds that the person alleging "that there is an error in any ... decision", D.C. Official Code § 6-641.07 (g)(1), must prove the error alleged. For the purposes of this appeal, the Appellant must show that the notice of revocation fails to demonstrate that a ground for revocation exists. If the notice is facially sufficient, the Appellant may nevertheless show that (1) the facts relied upon by the government were in error; (2) that the government misapplied those facts to the law; or 3) that there is a defense to the charge, such as laches or estoppel. Appellant, here, did not meet its burden of proof in any respect.

4. The Appellant did not meet its burden of proof

The notice, although not a model of clarity, does state enough facts to demonstrate that the Appellant was operating outside the scope of the certificate of occupancy. Notwithstanding DCRA's troubling admission that it "created the category of 'automobile service center' to facilitate the Appellant's efforts", the Board concludes that DCRA did not intend to sanction a use that required a special exception within the zone district, such as a repair garage. Thus, if the notice of revocation showed that the Appellant was operating a repair garage, it follows that they were operating outside the scope of their C of O.

Section 199.1 of the Zoning Regulations define repair garage as:

> a building or other structure, or part of a building or structure, with facilities for the repair of motor vehicles, including body and fender repair, painting, rebuilding, reconditioning, upholstering, equipping, or other motor vehicle maintenance or repair.

The definition is not limited to the categories listed, as suggested by Appellant. The Board therefore must simply determine, from the evidence submitted, whether automobiles are being maintained or repaired at the subject property.

The Board concludes that the facts stated in the notice sufficiently proved that a "repair garage" was the use being undertaken by Appellant. Whatever ambiguity might have existed in the notice, it was dispelled through the testimony of the government's and Intervenor's witnesses. All the activities listed in the Findings of Fact fall under the category of maintenance or repair. The advertisements and pictures submitted into the record also indicate that maintenance and repair activities were central to the Appellant's business.

Because the certificate of occupancy cannot be construed to have lawfully allowed this use and Appellant made no argument that such was the case, the Board concludes that the Appellant was operating outside its scope.

Appellant points to the fact that DCRA did not present any witness qualified to determine whether the activities of the Appellant fit within the category of repair garage. However, the Board, as the body charged with interpreting the Zoning Regulations, is more than able to make such a determination. In fact, it made the same determination with respect to this very property on March 30, 1998 (BZA No. 93-0006-CI).

In sum, Appellant was operating a repair garage in the C-3-A district under a certificate of occupancy that did not allow such a use. Appellant's certificate of occupancy was therefore validly revoked, pursuant to 12A DCMR § 118.4.2, because the actual use, repair garage, did not conform to whatever it was that was permitted (if anything) under his certificate of occupancy.

Estoppel and Laches

Appellant's defense, stated in his Proposed Findings of Fact and Conclusions of Law, is that DCRA's revocation of the Certificate of Occupancy was barred by the doctrines of estoppel and laches. The Board finds the Appellant's claims to be without merit.

"[T]he doctrine of equitable estoppel has traditionally not been favored when sought to be applied against a government entity. . . it is accepted that in certain circumstances an estoppel may be raised to prevent enforcement of municipal zoning ordinances." *Saah v. District of Columbia Board of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981); *see Wieck v. District of Columbia Board of Zoning Adjustment*, D.C.App., 383 A.2d 7, 11 (1978). The elements that must be shown in order to raise an estoppel against enforcement of a zoning regulation are: (1) that a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine. *Wieck v. District of Columbia Board of Zoning Adjustment,* 383 A.2d 7, 11 (D.C. 1978).

Furthermore, reliance by the party must be justified. *Nathanson v. District of Columbia Board of Zoning Adjustment*, 289 A.2d 881, 884 (D.C. 1972).

"Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978), quoting 3 RATHKOPF, LAW OF ZONING AND PLANNING, at 67-1 (3d ed. 1972). The two elements of laches are the unreasonableness of the delay and the resulting prejudice to the party asserting the defense. *See, e.g., American University Park Citizens Association v. Burka*, 400 A.2d 737, 741 (D.C. 1979).

Appellant does not establish that any reliance on the actions of the D.C. government would have led him to make expensive improvements in good faith, nor has Appellant shown that any enforcement action was unreasonably delayed.

Appellant, in support of his estoppel claim, points to a 1940 BZA variance approval, issued to Flood Motor Company, to permit the extension of an automobile repair shop and automobile sales and service agency. Appellant points to this evidence, introduced by ANC 3F, in an attempt to establish 1) that a repair garage was functioning on the subject property for 63 years, and 2) a repair garage was approved as a variance and therefore such approval continues to run with the land. As to the first assertion, the record does not indicate that this use was continuing. Appellant submits documentation related to four C of O's for the subject property. The first C of O, in 1983, is for "Automobile Sales and Service". Whenever it was that repair garage use was discontinued, it is clear from the record that it was no longer continuing under the 1983 C of O and was abandoned by virtue of a change in use. And in 1986, a C of O was issued for "Motor Vehicle Dealer," a use even further removed from a repair garage. As to the second contention, the use approved by the BZA in 1940 for Flood Motor Company was "subject to the condition that all repairing shall be incidental to the sale of new cars only" (Transcript of October 9, 1940, hearing at page 30). When the sale of new cars was discontinued at the subject property, the repairs were no longer incidental to the sale of new cars and, therefore, were not permitted under the variance granted. Moreover, the variance was for an *extension* of the repair shop and automobile sales use already in existence. The principal use, therefore, once abandoned, as was indicated by the circumstances discussed above, cannot be resurrected under a variance for a mere extension of that use alone.

More recent events also do not establish a claim for estoppel. The record shows that in 1998, Mr. Koo Yuen applied for a C of O for the subject property. The use applied for

and approved was Automobile Service Center. Nothing in the application or C of O issued indicates that Mr. Yuen was permitted to use the property for automobile maintenance or repairs. In fact, the application itself stated that it was for "(Automobile Service Center) Automobile Sales, Automobile Accessory Sales Including Installation", which does not rationally permit the type of high impact commercial activity associated with automobile maintenance or repair.

As for the C of O at issue in this case, not only was it for Automobile Service Center, not repair garage, it was a mere change of ownership application. The underlying use remained "Automobile Service Center". While the application included the words repair garage in parentheses, and the prior use indicated was "Repair Garage", this was not the use that was stated on the C of O.

Appellant's estoppel claim therefore fails because there was no indication that the government allowed, either actively or passively, a repair garage to operate at the subject property, and therefore any reliance on the government could not be said to have been in good faith.

Turning to Appellant's laches claim, ANC 3F Commissioner Karen Perry points out in her submission and accompanying documentation that DCRA has taken enforcement action against owners of the subject property for use as a repair garage as early as 1990, and continuing thereafter. At least one DCRA Administrative Law Judge's decision (OAD 90-1683-E) reveals that DCRA considered that a repair garage as a principal business at the subject location was not permissible without a special exception or variance approval. This decision was affirmed by the Board, who agreed with the ALJ that the Appellant was operating a repair garage in violation of his C of O. Based on the above, Appellant cannot establish that the government enforcement action in this case was delayed. Appellant's laches claim therefore fails.

Based on the above, it is hereby:

ORDERED that the Appeal is **DENIED**. The motions of the Intervenor, DCRA, and ANC 3F are therefore **GRANTED**, in part, and **DENIED**, in part.

VOTE: 5-0-0 (Geoffrey H. Griffis, Carol J. Mitten, Curtis L. Etherly, Jr., Ruthanne G. Miller, and David A. Zaidain to deny)

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[1] Also, as was pointed out at the hearing, a private party is entitled to bring an enforcement action pursuant to D.C. Official Code § 6-641.09 may do so in reliance on a Board Order.

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BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Order.

FINAL DATE OF ORDER: SEP - 8 2003

UNDER 11 DCMR 3103.1, NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT. CB/rsn

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